Supreme Court, U.S.
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No. __-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD HALL LIGHTFOOT,

Petitioner,

—v.—

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W. E. SHACKELFORD, Vice President, Industrial Chemicals Division,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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141 pp

QUESTIONS PRESENTED FOR REVIEW

1. On defendants' motion for summary judgment, whether plaintiff's claims under the Age Discrimination in Employment Act ("ADEA") were improperly dismissed on the basis of a purported offer of reinstatement.

2. Whether pre-termination damages and other remedies available under the ADEA were improperly precluded in light of the jury's finding of age discrimination.

3. Whether plaintiff's discrimination claim under ERISA (29 U.S.C. § 1140) was improperly dismissed.

4. Whether the district judge, who reduced the jury's verdict on findings of age discrimination from $750,000 to $75,000, on a remittitur motion, should have been disqualified.

LIST OF PARTIES
TO PROCEEDINGS BELOW

RICHARD HALL LIGHTFOOT,

Petitioner,

v.

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W.E. SHACKELFORD, Vice President, Industrial Chemicals Division,

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No. 99-_____

In the Supreme Court
of the
United States

October Term, 1998

RICHARD HALL LIGHTFOOT,

Petitioner,

v.

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W.E. SHACKELFORD, Vice President, Industrial Chemicals Division,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Richard Hall Lightfoot, plaintiff-appellant in the proceedings below, respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals dated March 1, 1999.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, Lightfoot v. Union Carbide Corp., is in the Appendix at 1a-6a.

The decision is not published: it states that "this summary order will not be published in the Federal Reporter and may not be cited as precedential authority to this or any other court. . . ."

The decision in a prior appeal is published as Lightfoot v. Union Carbide Corp., 110 F.3d 898 (2d Cir. 1997), and is in the Appendix at 11a-43a. The prior decision holds that the district court violated Mr. Lightfoot's jury trial rights in its remittitur decision because it failed to afford him the option of a new trial, and remanded the matter "to the district court for reconsideration of the court's grant of the remittitur of damages." (43a; 110 F.3d at 915).

The pertinent district court decisions dated October 24, 1995, and May 12, 1994, are in the Appendix at 54a-62a and 63a-94a, respectively.[1]

JURISDICTION

The judgment of the Court Appeals was entered on March 1, 1999. (App. 1a-6a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

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[1] Citations followed by the suffix "a" refer to the Appendix annexed hereto. Citations preceded by the prefix "J.A." refer to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution, Right to Trial by Jury, is involved in this case. The statutory provisions include the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA") and particularly 29 U.S.C. §626, the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 216, 255, the Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e-5(g), and the Judiciary and Judicial Procedure Act, 28 U.S.C. §§ 144 and 455(a). The foregoing provisions are in the Appendix at 108a to 112a.

STATEMENT OF THE CASE

Petitioner is Richard Hall Lightfoot, who was hired as a chemical engineer and had been a career employee of Union Carbide Corporation. His date of birth is June 22, 1935. The pretext given for his termination in early 1992 was a downsizing program.

At age 56, however, Mr. Lightfoot was the both the oldest and most experienced person in the group of employees considered, and also the only one who was terminated. (J.A. 250-251) Previously he told his supervisor that his career objective was to remain with Union Carbide until age 70, evoking a reaction of hostility and disbelief. (J.A. 40-1) Retaliatory demotions ensued that culminated in his termination about two years later. (J.A. 40-51; 267-320)

The termination of Mr. Lightfoot occurred at the same time that he was designated by Union Carbide as the co-inventor of a patented new product of great value, a new anti-icing fluid adding substantially to the safety of airline operations, as well as to Union Carbide's profits. (J.A. 61-62; 284; 301-2; 1744-1748)

Mr. Lightfoot was not only the oldest member of the group considered for termination, but he also was the only one who had ever participated in inventing or developing new products, which he did extensively. (J.A. 61-62; 282-286; 299-301; 1748-1753)

Mr. Lightfoot petitions for review of the use of summary judgment to dismiss his claim under the ADEA, and the denial of any remedy thereunder, notwithstanding the rendition of the following verdict after the first trial (App. 46a-48a):

> "THE CLERK: Would the foreperson please rise.
>
> Has the jury agreed upon a verdict?
>
> "THE FOREPERSON: Yes, we have.
>
> "THE CLERK: To question 1, was age discrimination a motivating factor in the defendants' decision to terminate the plaintiff?
>
> "THE FOREPERSON: Answer yes.
>
> "THE CLERK: To question 2, would the defendants have made the same decision to terminate plaintiff even if it had not taken the plaintiff's age into account?
>
> "THE FOREPERSON: Answer no.
>
> "THE CLERK: To question 3, specify the amount of compensatory damages to be awarded to the plaintiff.
>
> "THE FOREPERSON: Amount $750,000."

Thereafter, the district court remitted the damages awarded by the jury's verdict from $750,000 to $75,000. (App. 51a-59a)

On appeal, the United States Court of Appeals for the Second Circuit held that the district court had erred in granting defendants' motion for remittitur without offering Mr. Lightfoot the option of a new trial on damages as violating the trial-by-jury protections of the Seventh Amendment, citing Kennon v. Gilmer, 131 U.S. 22, 29 (1889). (App. 42a.)

The case was remanded to the district court "for reconsideration of the remittitur of damages." (App. 43a) The district judge did not reconsider the remittitur of damages, however, but instead sent the case to another trial on the issue of damages, after declining to recuse himself. (App. 49a-53a)

At the second trial, following the district court's exclusion of large quantities of evidence proffered on behalf of Mr. Lightfoot (App. 63a-66a), and directing that no reference be made to the jury about the amount of his damages, although that had been permitted in the first trial (App. 36a-37a), a verdict in the amount of $20,000 was returned. (App. 7a-8a.)

The reduced judgment was affirmed in the second appeal in an unpublishable decision. (App. 1a-6a.)

The damages were limited only to compensatory damages under the New York State Human Rights Law. Because Mr. Lightfoot's claims under the ADEA had been dismissed on defendants' motion for summary judgment, Mr. Lightfoot was not permitted to claim liquidated damages for back pay, front pay, or other remedies including attorney's fees available as provided in the ADEA. (App. 55a-58a.)

The net result of the litigation to Mr. Lightfoot has been punitive when the expense of litigation is considered.

Even though the jury found that Lightfoot's termination had been caused by age discrimination, the second jury was forced to speculate about the complex concept of compensatory damages without being permitted to receive any guidance in the form of testimony or comments by counsel. (App. 64a-66a.)

The disparity in the damages awarded in the two trials was not surprising in view of the disparity in the ground rules in the two trials applied by the same judge.

The case cries out for appellate supervision because it involves the abuse of the summary judgment and remittitur procedures by the district judge.

REASONS FOR GRANTING THE PETITION

I. THE PRECLUSION OF ANY REMEDIES UNDER THE ADEA, NOTWITHSTANDING FINDINGS OF AGE DISCRIMINATION, PRESENTS AN IMPORTANT QUESTION FOR REVIEW

The summary judgment dismissal of Mr. Lightfoot's ADEA claims was predicated upon the receipt of a letter purporting to offer reinstatement, and upon this Court's decision in a Title VII case, Ford Motor Co. v. EEOC, 458 U.S. 219, 102 S.Ct. 3057 (1982). (App. 25a-28a; 53a-55a: 69a-70a; 78a-80a.)

Mr. Lightfoot's argument that the purported offer of reinstatement gave rise to disputed fact issues that should have been presented to the jury was rejected. (App. 25a-28a.)

The dismissal of Mr. Lightfoot's ADEA claims was based upon the Second Circuit's conclusion that the "relief specifically

requested by the plaintiff is unavailable as a matter of law" in light of the Court's decision in Ford Motor Co. v. EEOC, 458 U.S. 219, 241. (App. 25a-28a.)

However, the Title VII provisions which were the basis of the decision in Ford Motor,[2] 458 U.S. at 225, are notably absent from the ADEA.[3] The ADEA's remedial provisions refer to the Fair Labor Standards Act of 1938, unlike Title VII, whose remedial provisions are based upon from the National Labor Relations Act, as noted in the opinion in Ford Motor. 458 U.S. 218, 226, footnote 8.

While Title VII provides back pay as a matter of equitable discretion, the ADEA provides it as a matter of right. Lorillard v. Pons, 434 U.S. 575 (1978).

The courts below therefore should not have applied as a matter of law a ruling expressly limited to Title VII to the remedies available under a different statute whose remedial provisions are substantially different from those under Title VII. As stated in Fiedler v. Indianhead Truck Line, 670 F.2d 806, 810 n.3 (8th Cir. 1982),

> "[T]itle VII and the ADEA are not consistent because Congress made the ADEA enforcement provisions a hybrid of the Fair Labor Standards Act and title VII. The clear language of the statutes will often not permit interpreting the statutes in harmony," citing

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[2] ". . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against *shall* operate to reduce the back pay otherwise allowable" (emphasis added).

[3] As quoted on page 108a-110a of the appendix annexed hereto.

Lorillard v. Pons, 434 U.S. at 583-84.

Such a fundamental error cannot be allowed to continue to deprive plaintiff herein of his rights and remedies specific to the form of discrimination visited upon him and graft onto a statute whose language does not permit such action a provision that applies only to a different law.

This is a particularly noxious result in light of the unquestioned finding by the jury that age discrimination against Mr. Lightfoot was "a motivating factor in defendants' decision to terminate the plaintiff." (J.A. 2293a)

The importance of review is highlighted by the dismissal of Mr. Lightfoot's ADEA claims on summary judgment notwithstanding the existence of disputed fact issues that had been raised. These included (a) whether the offer involved in the purported reinstatement letter (set forth at App. 102a-103a) in fact was a humiliatingly downgraded job with the same title but not the same function as Mr. Lightfoot's former position, (b) whether he should be forced, as a matter of law, to return as a subordinate of a person whose ageist bias had already resulted in his termination in order to retain his ADEA remedies, or (c) whether that would instead add to the precariousness of Mr. Lightfoot's employment situation and also subject him to adverse health consequences in view of his acute hypertension.

By again exposing Mr. Lightfoot to the risk that a hostile supervisor would search to create yet another pretext to rid himself of Mr. Lightfoot, and purport to justify to his management the earlier action taken requiring Mr. Lightfoot alone to walk the plank under the "forced ranking" procedure used, the purported reinstatement offer would expose Mr. Lightfoot to far greater injury instead of having the effect of mitigating his damages. (App. 25a-28a; 65a-66a; 78a-80a.) See Rodgers v. Western-Southern Life Ins. Co, 12 F.3d 668, 677 (7th

Cir. 1993).

Such disputed fact issues involving offers of reinstatement have commonly been required to be submitted to a jury, not decided as a matter of law in other courts. See Bruno v. W.B. Saunders Co., 882 F.2d 760, 771 (3d Cir. 1989) ("We also observe that the evidence surrounding the [purported reinstatement offer] could support a conclusion that position was offered her in bad faith.").

The decision to grant summary judgment dismissing the ADEA claims, notwithstanding the disputed fact issues raised below, therefore should be reviewed to determine whether such decisions are inconsistent with the decisions in other circuits and the principle established by this Court in Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986), that "[the] evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."

The price of obtaining a remedy under the ADEA cannot have been intended to include forcing a victim of age discrimination once more to subject himself to a hostile supervisor guilty of age discrimination against him under the applicable statutory provisions.

So far as we can determine, this presents an issue of first impression and the importance of its consideration by this Court is self-evident.

II. REVIEW IS URGENTLY NEEDED TO PRESERVE THE EFFICACY OF THE REMEDIAL PROVISIONS OF THE ADEA

In McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), certiorari was granted to review the effect of a summary judgment dismissal of remedies under the ADEA based upon post-termination circumstances extrinsic to the plaintiff's age discrimination claim.

An a fortiorari situation for certiorari is presented by the instant petition. Summary judgment was used to preclude any remedies under the ADEA because of a post-termination event, namely, the rejection of a subsequent purported offer of reinstatement, notwithstanding a jury's verdict that the termination of Mr. Lightfoot months earlier was motivated by age discrimination.

Under McKennon, the post-termination conduct of the former employee was specifically assumed to involve wrongdoing. (513 U.S. at 361)

In the instant case, however, Mr. Lightfoot's rejection of the purported offer of reinstatement can not be considered as even approaching wrongdoing.

As the so-called reinstatement letter itself shows, (App. 102a-103a), the Market Manager position involved was one of the two remaining after the third, Lightfoot's had been eliminated through downsizing. (App. 102a-103a.) In other words, Mr. Lightfoot's position as the letter indicates had not even been in existence since April 27, more than six months earlier. The two people left had been doing the "remaining work."

The position being offered was that from which a relative neophyte, Mr. D.G. Roberts, nearly 25 years Lightfoot's junior, himself had resigned after the downsizing from three to two positions had already occurred. (App. 105a-106a)

On such facts as are shown in the letter itself (App. 105a-106a), whether the position was functionally different from the Lightfoot position that had been abolished months before would be a disputed fact issue requiring submission to a jury. Whether Roberts had resigned because of the unattractiveness or impossibility of performing satisfactorily in a work environment that had been irretrievably altered by the downsizing that had taken place would be evidence a jury should be permitted to consider in determining whether it was reasonable for Mr. Lightfoot to accept the purported offer of reinstatement.

The opinion in McKennon is very specific concerning the differences between the remedial provisions of the ADEA and Title VII, describing the former as "something of a hybrid" because of its utilization of the Fair Labor Standards Act, (513 U.S. at 357).

This step was entirely obviated by the decisions below which incorrectly made the assumption that severance pay, a fringe benefit earned not for current services, but vested as a result of years of prior services, and the loss of backpay for current services are the same thing.

The FLSA uses "wages" in the sense of earnings for services currently performed, not a fringe benefit such as "severance pay" incurred as an outgrowth of length of prior service for the employer.

As stated in McKennon, in ADEA cases, the beginning point in the formulation of a remedy "should be the calculation of backpay from the date of the unlawful discharge to the date

the new information was discovered." (513 U.S at 362)

The terminology used in the Fair Labor Standards Act does not involve what could remotely be considered to include "severance pay:" an employer who violates the statute "shall be liable" for "the payment of wages lost and an addition equal amount as liquidated damages." (29 U.S.C. § 216 (b) quoted at App. 112a; emphasis added.)

The distinction is an important one in the statutory scheme of the remedial provisions available under the ADEA in light of its specific provision for the doubling of unpaid "wages" as damages if the discriminatory acts are found to be "willful violations."

The provision for liquidated damages under the ADEA is not part of Title VII. The computation of "unpaid wages" and liquidated damages for the purpose of the ADEA is separate and distinct from remedies provided under Title VII.

The decisions below that equate severance pay to back pay for this purpose therefore has the effect of eliminating the liquidated damage provision of the ADEA for willful age discrimination.

The nullification of such an important part of the enforcement and remedial provisions of the ADEA urgently is in need of review as a consequence.

Further, the back pay liability of defendants goes back prior to Mr. Lightfoot's termination date since the applicable statute of limitations for willful violations is three years under the applicable statutory provisions (quoted at App. 111a), and during that period demotions and additional discriminatory acts occurred diminishing the back pay that Mr. Lightfoot should have

received.

Unlike the decisions below, other circuits have applied the continuing violation doctrine to reach such pre-termination discriminatory conduct. West v. Philadelphia Elec. Co., 45 F.3d 744, 755 (3d Cir. 1995), states:

> "Once the plaintiff has alleged sufficient facts to support use of the continuing violation theory, however, the 300-day filing period becomes irrelevant -- as long as at least one violation has occurred within that 300 days. Plaintiff may then offer evidence of, and recover for, the entire continuing violation. At that point as well, the Federal Rules of Evidence and the substantive law at issue, rather than the statutory filing period, should govern evidentiary determinations of the trial court." (Emphasis added.)

The petition therefore should be granted to review the disparity in these decisions from other Circuits and the decisions of the courts below.

See Waltman v. International Paper Co., 875 F.2d 468,476 (5th cir. 1989) ("The Meritor Savings Bank decision is relevant to the continuing violation theory because a hostile environment claim usually involves a continuing violation."); see also Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct 367 (1993) (considering acts spanning a two and one-half year period); Meritor Savings Bank, FSB v. Vinson et al., 477 U.S. 57, 106 S.Ct. 2399 (1986) (considering acts spanning four year period).

Finally, the provision for attorney's fees for a victim of age discrimination, as Mr. Lightfoot was found to be, is an exceedingly important part of the Fair Labor Standards Act remedies provided under the ADEA because it is mandatory, not discretionary. Under 29 U.S.C. §216, quoted at App. 110a -

111a: "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant" (emphasis added), a remedy very much needed to bring such semblance of levelness to the playing field in this type of employment litigation.

29 U.S.C. § 626 (c) (1), quoted at App. 109a, states further that "Any person may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . ." (Emphasis added.)

The fact that the remedy of attorney's fees is not available under the New York Human Rights Law makes it all the more important that this part of the remedial provisions of the ADEA be given effect, particularly in light of the deterrence objective emphasized in McKennon (513 U.S. 352, 362). See also Biggins v. Hazen Paper Co., 953 F.2d 1405, 1428 (1st Cir. 1992).

The net effect of the decisions below was to nullify the remedies made available by Congress for victims of age discrimination under the ADEA. The importance of granting the petition to review such issues therefore is apparent, and also consistent with the issuance of a writ to review such issues in McKennon. 513 U.S. 352.

III. THE IMPORTANCE OF REMEDIES UNDER ERISA FOR DISCRIMINATION SHOULD BE REVIEWED

The district court also used summary judgment to dismiss Mr. Lightfoot's claim for relief under Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1140, notwithstanding the fact that the statute makes it

> ". . . unlawful for any person to discharge. . . or discriminate against a [pension plan] participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . . (App. 81a; emphasis added.)

This was affirmed on appeal. (21a-22a) However, the Second Circuit did not cite any case in which there was sufficient evidence before a jury to support a finding that the termination of Mr. Lightfoot had been unlawfully discriminatory.

Thus, the dismissal of Mr. Lightfoot's ERISA claim on summary judgment notwithstanding the evidence of the motivation of age bias in connection with his termination presents a situation that the Second Circuit ignored.

The importance of a remedy under ERISA therefore should be considered especially in view of the apparent inconsistency with this Court's decision in Hazen Paper Co., et al. v. Biggins, 507 U.S 604, 607-613, 113 S.Ct. 1701, 1705-7 (1993).

That such discriminatory motivation has wreaked havoc on the accrual of expected rights under pension plans has not escaped leading financial analysts, as shown in the recent "Pension Plans From Hell" feature in Barron's for August 18, 1997, p. 46.

The importance of the topic as analyzed in Barron's warrants consideration by this Court. In view of the following comment, claims asserted under Section 510 of ERISA to provide a remedy for such discriminatory abuses should not be buried by summary judgment dismissals that prevent the development of such issues at a trial (Barron's, 8/18/97, p.46):

"Companies will skirt or break the law as long as the incentives to get rid of people. . .will remain strong. Between 1993 and 1995 the government estimates that 9.4 million workers permanently lost their jobs. That's an all time high. Curiously, however, most of the same companies that downsized have more employees than they did before the process started."

* * * * *

"We must expect that companies push the legal envelope as far as possible, knowing that the odds of getting away with it are greatly in their favor." (Emphasis added.)

IV. THE COURT'S SUPERVISORY POWER SHOULD BE EXERCISED TO CONSIDER THE DISQUALIFICATION OF THE DISTRICT JUDGE

The affidavit of Mr. Lightfoot in support of his first request for disqualification of the District Judge is in the Appendix at 95a-104a.

The affidavit indicates that shortly before the first trial, the district judge put pressure on Mr. Lightfoot to settle the case for $100,000, a figure the judge indicated that he had reason to believe on the basis of ex parte discussions would be acceptable to defendants, notwithstanding the judge's knowledge that a settlement at that figure "would have entirely destroyed any economic benefit" to Mr. Lightfoot in having prosecuted the litigation. (App. 97a.) Mr. Lightfoot's affidavit further states (App. 99a-100a):

"(u) Because I refused to settle for $100,000 it is apparent to me that Judge Baer's figure of $75,000 was intended to punish me for exercising my jury trial rights instead of clearing his docket by settling the case. Judge Baer intended to deprive me of the verdict which the jury returned and put a value of the case which was 25 percent less than what he himself indicated would have been in his view a viable settlement figure after I had gone through the further time, effort, expense and risk of proceeding to try the case over an extended period of time.

"(v) Thus it is apparent that Judge Baer's Order and Opinion was not arrived at in good faith but an outgrowth of prejudice against me and should be vacated for that reason.

"(w) The punitive purpose of the Order and Opinion dated October 24, 1995, is made clear by the fact that, at the time he issued that Order and Opinion, he already was aware, based on my attorney's fees application, that the amount that I had invested in the case for attorney's fees was substantial, since nearly 3,000 hours of attorneys' time was involved.

"(x) Judge Baer therefore knew, based upon what I had said at the conference on June 21, 1995, that, considering what I had invested in the case in attorney's fees, I would be a substantial loser, near the end of my resources, at his figure of $75,000, after the trial, even though the jury strongly had found me to be a victim of age discrimination as set forth in the special interrogatories submitted to the jury . . . Thus the punitive intent of Judge Baer is obvious in the context of the discussions on June 21, 1995."

"The goal of [28 U.S.C.] section 455 (a) is to avoid even the appearance of partiality." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860, 108 S.Ct. 2194, 2203 (1988) quoting Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983).

Judge Baer's ex parte statements demonstrated both a prejudicial attitude towards the merits of the case and personal animus against the plaintiff (97a-100a). The $100,000 settlement figure that Judge Baer proposed just before the trial was based upon information that he had received from the defendants. In granting remittitur, reducing the verdict from $750,000 to $75,000, therefore, the judge arbitrarily selected a figure derived from what defendants had previously stated to him would be accepted in ex parte communications.

An abuse of the judicial process and a violation of 28 U.S.C. 455(a) therefore occurred under Liteky v. United States, 510 U.S. 540 (1994), because the crucial $75,000 figure used by the district judge in the remittitur order involved information on a subject obtained by the judge from an extrajudicial source in the form of ex parte settlement discussions occurring just before the trial.

Commonwealth Coatings Corp. v. Continental Casualty Co. states: "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." 393 U.S. 145, 89 S. Ct. 337, 340, 21 L. Ed. 2d 301 (1968). See also Nicodemus v. Chrysler Corp., 596 F.2d 152, 157 (6th Cir. 1979); United States v. Robin, 553 F.2d 8, 10-11 (2d Cir. 1977) (en banc) (per curiam).

Disqualification is necessary to "preserve not only the reality but the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice." United States v. Torkington, 874 F.2d 1441, 1447 (11th Cir. 1989).

The right to trial by an impartial judge "is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). To fulfill this requirement--and to avoid both bias and the appearance of bias--this Court has both supervisory authority and responsibility to see to it that district judges are disqualified in such circumstances. See Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir.) cert. denied, 459 U.S. 880 (1982), which states: "impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system." 671 F.2d at 789.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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